

SERVICE DATE – JULY 15, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35732

SONOMA-MARIN AREA RAIL TRANSIT DISTRICT—ACQUISITION EXEMPTION—
IN MARIN COUNTY, CAL.

Digest:¹ This decision grants Sonoma-Marín Area Rail Transit District authority to acquire an approximately 11.25-mile line of railroad in Marin County, Cal., from Golden Gate Bridge, Highway, and Transportation District; County of Marin; and Marin County Transit District.

Decided: July 9, 2013

By petition filed on April 22, 2013, Sonoma-Marín Area Rail Transit District (SMART) seeks an exemption pursuant to 49 U.S.C. § 10502 and 49 C.F.R. pt. 1121 from the prior approval requirements of 49 U.S.C. § 10902 for authority to acquire approximately 11.25 miles of railroad (Subject Line) from Golden Gate Bridge, Highway, and Transportation District (Bridge District); County of Marin (County); and Marin County Transit District (Transit District). The Subject Line extends from approximately milepost 15.71 at Corte Madera, Cal., to approximately milepost 26.96 at Novato, Cal. No comments were filed by other parties. We will grant the petition for exemption.

BACKGROUND

On October 25, 2005, SMART—a Class III rail carrier² and a special district created pursuant to California law³ to operate passenger rail service in the Counties of Sonoma and Marin—reached an agreement to purchase railroad trackage and right-of-way from the Bridge

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² SMART became a rail carrier in 2004 upon acquiring the physical assets of a rail line, subject to an easement for freight rail service over the line and an operating agreement subsequently providing for service. SMART retained a residual common carrier obligation over that line. See Sonoma-Marín Area Rail Transit Dist.—Acquis. Exemption—Nw. Pac. R.R. Auth., FD 34400 (STB served Mar. 10, 2004).

³ Cal. Pub. Util. Code § 105000 et seq.

District, the County, and the Transit District extending from milepost 11.4 to milepost 26.96 (San Rafael Line).

On March 20, 2006, SMART filed with the Board a verified notice of exemption under 49 C.F.R. § 1150.41 to acquire and operate the San Rafael Line (2006 Notice). As discussed in the 2006 Notice, the transaction involved the acquisition by a public agency (i.e., SMART) of real estate and rail facilities owned by other public agencies (i.e., the Bridge District and the Transit District) and the County, in an effort to place the San Rafael Line in the ownership of an agency (i.e., SMART) legally authorized to operate passenger rail service on the line.

In a decision served February 1, 2008, the Board rejected the 2006 Notice. Sonoma-Marin Area Rail Transit Dist.—Acquis. & Operation Exemption—Nw. Pac. R.R., FD 34842, slip op. at 1 (STB served Feb. 1, 2008). As a basis for the rejection, the decision noted that “Board staff [] repeatedly asked SMART for clarification of the notice with respect to what entity has or would have responsibility for providing freight service over the portion of the [Subject] Line that remains under the Board’s jurisdiction,” and SMART failed to “file[] any clarification or response.” Id. The rejection decision further stated that (1) “SMART fail[ed] to identify specifically what entity has the common carrier obligation to provide freight service over the [Subject] Line and from which it would acquire that common carrier obligation;” (2) “SMART state[d] that it would not fulfill [the common carrier] obligation because it would not provide freight service over the [Subject] Line and it fail[ed] to identify any entity that could or would provide such service;” and (3) SMART neither disclosed the existence of a freight railroad with a common carrier obligation over the northern-most segment of the Subject Line—the portion extending between approximately mileposts 25.6 and 26.96 (Novato Segment)—nor provided notice that such common carrier obligation “either has changed or soon will change” to a different carrier. Id. at 1-2.

In its April petition, SMART informs the Board that it consummated this transaction and acquired the San Rafael Line on March 27, 2006. Also in its petition, SMART apologizes for consummating the transaction without first obtaining authority from the Board, not previously responding to the Board’s inquiries, and inaccurately reporting the status of the various segments of the San Rafael Line in the 2006 Notice.⁴ In an effort to cure these deficiencies, SMART first explains that it is currently rebuilding the line for use as part of its contemplated intrastate commuter passenger rail system, which is expected to open by 2016. SMART further explains that the segment of the San Rafael Line between mileposts 11.4 and 15.71 was previously abandoned and therefore is not subject to the Board’s jurisdiction (and therefore is not a portion of the Subject Line at issue).⁵ According to SMART, the remainder of the San Rafael Line—the

⁴ SMART requests that the Board authorize the transaction on a going-forward basis, and does not request that the Board grant retroactive authority for acquisition of the Subject Line.

⁵ Nw. Pac. R.R.—Aban. Between Detour & Sausalito, Marin Cnty., Cal., FD 26736 (ICC served Oct. 20, 1971) (granting abandonment authority for rail line extending between mileposts 6.841 and 14.331); Nw. Pac. R.R.—Aban.—In Marin Cnty., Cal., AB 14 (Sub-No. 3) (ICC served July 13, 1982) (granting abandonment authority for rail line extending between mileposts 14.329 and 15.73). SMART notes that since these two abandonment decisions, predecessors in

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segment between mileposts 15.71 and 26.96—is a line of railroad subject to the Board’s jurisdiction and constitutes the Subject Line. SMART asserts that common carrier service was discontinued in 1989 over the segment of the Subject Line between mileposts 15.71 and 25.6.⁶ SMART further asserts that the Northwestern Pacific Railroad Company (NWP) currently operates freight rail service and has a common carrier obligation over the Novato Segment—extending between mileposts 25.6 and 26.96—pursuant to a contract with the North Coast Railroad Authority (NCRA), which holds an exclusive freight easement over that segment. Nw. Pac. R.R.—Change in Operators Exemption—N. Coast R.R. Auth., FD 35073 (STB served Aug. 30, 2007). SMART also indicates that it retains a residual common carrier obligation to provide freight service over the Novato Segment, and should NWP relinquish its common carrier obligation, NCRA in the first instance or SMART in the second instance would contract with a freight operator to provide rail service on the Novato Segment upon receiving the appropriate Board authority.

In support of its petition, SMART asserts that it properly disclosed in its 2006 Notice the purpose of the transaction, which remains unchanged, and that no prejudice to any party will result from SMART’s various oversights. SMART explains that freight rail service on the majority of the Subject Line has been discontinued for decades and that the common carrier obligation over the active portion of the Subject Line (the 1.36-mile Novato Segment) has been held by freight operators other than SMART or its predecessor in interest pursuant to a freight easement for the duration of time between SMART’s acquisition of the Subject Line and the filing of this petition.

DISCUSSION AND CONCLUSIONS

SMART violated the Board’s statutes and regulations when it consummated this transaction one week after filing the 2006 Notice—while the 2006 Notice was still pending before the Board and well before the 2006 Notice, even if it had been approved, would have become effective. We are also troubled that it took SMART so long to come back to the Board to remedy this violation. We admonish SMART to comply fully with our statutory and regulatory requirements in the future or face enforcement actions.

Under 49 U.S.C. § 10902(a), the acquisition of a line of railroad by a Class III carrier requires prior approval by the Board. However, under 49 U.S.C. § 10502(a), the Board must

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interest to SMART, as well as the Board and its predecessor agency, have treated the portion of the line between mileposts 15.71 and 15.73 as continuing to fall within the Board’s jurisdiction. To avoid any doubt, SMART indicates that the southern terminus of the Subject Line extends to include that 0.02-mile segment.

⁶ Nw. Pac. R.R.—Discontinuance Exemption—Operations in Marin Cnty., Cal., AB 14 (Sub-No. 6X) (ICC served June 9, 1989) (granting authority to discontinue service over rail line extending between mileposts 15.71 and 25.821). SMART notes that since this discontinuance decision, other carriers and the Board have treated the portion of the line between mileposts 25.6 and 25.821 as an active line of railroad.

exempt a transaction or service from regulation if it finds that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

In this case, an exemption from the prior approval requirements of 49 U.S.C. § 10902 is consistent with the standards of 49 U.S.C. § 10502. Detailed scrutiny of this transaction through an application for review and approval under 49 U.S.C. § 10902 is not necessary to carry out the rail transportation policy here. SMART has adequately addressed the Board's questions that led to its 2008 rejection of the 2006 Notice.⁷ An exemption from the application process would minimize the need for Federal regulatory control (49 U.S.C. § 10101(2)), foster sound economic conditions in transportation (49 U.S.C. § 10101(5)), reduce regulatory barriers to entry into the rail industry (49 U.S.C. § 10101(7)), and provide for the expeditious handling and resolution of proceedings required or permitted to be brought before the Board (49 U.S.C. § 10101(15)). Other aspects of the rail transportation policy would not be adversely affected by use of the exemption process.

Regulation of this transaction is not needed to protect shippers from an abuse of market power.⁸ The majority of the Subject Line has not had freight rail service for many years and does not serve any shippers. Furthermore, the freight rail operator with the common carrier obligation on the active Novato Segment portion of the Subject Line did not and would not change as a result of our approval of this transaction. Thus, SMART's acquisition in this proceeding would not change the operational access of shippers to transportation services and would have no impact on competition. Moreover, no shipper (or any other entity) has objected to this transaction.

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. However, the statute makes clear that labor protective conditions cannot be imposed in acquisition proceedings initiated by Class III rail carriers under § 10902. 49 U.S.C. § 10902(d).

This transaction is exempt from the environmental reporting requirements under 49 C.F.R. § 1105.6(c)(2) because it would not result in a significant change in carrier operations. Similarly, the transaction is exempt from the historic reporting requirements under 49 C.F.R. § 1105.8(b)(1) because there are no plans to dispose of or alter properties subject to the Board's jurisdiction that are 50 years old or older, and further Board approval would be required to abandon the Subject Line or discontinue service over the Novato Segment portion of the Subject Line.

⁷ The Board's exemption of the transaction is forward-looking only and does not cover the period between 2006 and the effective date of this decision.

⁸ Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502, the above-described transaction is exempted from the prior approval requirements of 49 U.S.C. § 10902 on a going-forward basis.
2. Notice will be published in the Federal Register.
3. The exemption will become effective on August 14, 2013.
4. Petitions to stay must be filed by July 25, 2013. Petitions for reconsideration must be filed by August 5, 2013.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.